No. ~~811~~ 87

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1956~~ 57

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 203) has not yet been reported.

JURSDICTION

The judgment of the Court of Appeals was entered on February 4, 1957 (R. 210). The petition for a writ of certiorari was filed on March 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established the defense of entrapment.

2. Whether, where the defense indicated in the opening statement that it was relying on the defense of entrapment, the government could properly prove accused's two prior narcotics convictions as part of its direct case.

STATEMENT

The first trial of petitioner in the United States District Court for the Southern District of New York resulted in a conviction for three sales of heroin (three counts) in violation of 21 U.S.C. 173, 174, which was reversed by the Court of Appeals for the Second Circuit (*United States* v. *Sherman*, 200 F. 2d 880 (C.A. 2)) because of erroneous instructions on the defense of entrapment. At a second trial, petitioner was again convicted on all three offenses and this time his conviction was affirmed.

The evidence may be sumarized as follows:

1. In May or June, 1951, Charles Kalchinian was arrested for illegally selling narcotics (R. 67). Thereafter, he agreed to, and did, serve as a special employee or agent of the Federal Bureau of Narcotics while at liberty on his own recognizance (R. 12, 67, 88, 89). During the latter part of August, 1951, Kalchinian happened to meet the defendant at a doctor's office where both were seeking treatment for narcotics addiction (R. 68, 90, 91). During their first encounter their discussion was limited to their mutual experiences, but subsequently Kalchinian,

after indicating a personal need for narcotics, asked the defendant if he (Sherman) had a reliable source that Kalchinian could meet (R. 69, 94). Defendant was non-committal regarding this inquiry (R. 92). On a later occasion he informed Kalchinian that his contact was going out of business and that Kalchinian therefore could not meet him. However, defendant suggested that he might be able to see to it that Kalchinian received narcotics (R. 69-70). On a later occasion Kalchinian again asked Sherman for narcotics and the petitioner replied that "he was working on it" (R. 70, 96). Petitioner never provided a means whereby Kalchinian could contact him, but did arrange to contact Kalchinian "whenever he was ready" (R. 70). Sometime during the first part of September, 1951, the petitioner delivered narcotics to Kalchinian, and thereafter would call Kalchinian some three or four times a week. These calls often resulted in a meeting at which petitioner would deliver narcotics to Kalchinian (R. 71). Toward the end of October, 1951, Kalchinian reported to the Federal Bureau of Narcotics that he had found a person from whom he could purchase drugs, and arrangements were made to make the "buys" which form the gist of the counts presently before this Court (R. 71, 73-74).

On November 1, 1951, Kalchinian informed Agent Clifford Melikian, of the Federal Bureau of Narcotics, that he intended to purchase narcotics from this defendant later that day (R. 12, 74). Agents Melikian and Hunt arranged a meeting with Kalchinian and at that time searched him to insure that he was

not then in possession of any narcotics. Kalchinian was then furnished with government funds with which to make the "buy" (R. 12, 74). Thereafter, Kalchinian met the defendant according to their arrangement and bought for $15 a white substance enclosed in a small glassine envelope (R. 13, 75).

The procedure outlined above was repeated on November 7 and 16, 1951 (R. 14-16, 76-79). The defendant was arrested after the third purchase, and the money which had been given to Kalchinian on that day was found on defendant's person (R. 16). Upon subsequent laboratory analysis, the substance purchased in each instance turned out to be heroin. Prior to dealing with petitioner, Kalchinian had purchased similar quantities of narcotics from other sources at a lower price (R. 80-81).

2. Petitioner did not take the witness stand nor did he call any witnesses. Defense counsel's opening statement to the jury, however, consisted of an argument that the government's own witnesses would establish the defense of entrapment (Special Record, p. 328),[1] and his counsel cross-examined Kalchinian at great length to develop an issue of entrapment. On this basis the government, as part of its case in

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[1] Petitioner's opening statement does not appear in the record presently on file with the Court. However, the Court of Appeals for the Second Circuit granted leave to amend and supplement the record by adding to it the transcript of the appellant's opening statement to the jury. Later, the Court of Appeals ordered that the complete original record be certified and transmitted and it is filed herewith. References to the original record will be indicated as Special Record, p. —. The references designated "R." are to the record filed by petitioner.

chief, showed that the accused had been convicted of selling opium in 1942 and of possessing narcotics in 1946 (R. 136-138, 180, 187; Special Record, Exhibits). The jury was properly instructed on this defense (R. 187-189).[2]

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[2] In part, the instruction reads as follows:

"The defendant in addition to his plea of not guilty has offered testimony by way of cross examination which, if believed by you, would constitute the defense of entrapment.

"It is undoubtedly true that the creation by the Government employee of the opportunity or facility for the commission of a crime does not defeat the prosecution. Artifice and stratagem can be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity is to reveal a criminal design, to expose illicit traffic and other offenses, and thus disclose would-be violators of the law.

"But when the criminal design originates with Government officials or employees and they implant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute, then in such an event a defendant cannot be found guilty but must be acquitted, and this is so because the defendant is entrapped into committing a crime, and that shocks public decency.

* * * * *

"And bear in mind that even if you believe that the defendant has been previously convicted of narcotics, the defendant may still have been induced and entrapped to commit the crime charged here. And if you find that to be so you must acquit the defendant despite his previous convictions.

"In short, on this issue of entrapment, if you believe that the defendant was induced by Kalchinian to commit the offenses charged in the indictment, you must acquit unless you find that the Government has sustained its burden of proving that the accused was ready and willing without persuasion, and was waiting for a propitious opportunity to commit the offense."

* * * * *

ARGUMENT

1. Petitioner's argument that the government's evidence established entrapment rests on the fact that Kalchinian, special employee of the government, first broached the subject of narcotics, and made several requests before his efforts met with success. But this does not compel the inference that petitioner was a person who was drawn into crime solely through the government's efforts. His caution was no more than that to be expected on the part of any experienced trafficker in habit-forming and forbidden drugs. Kalchinian was a complete stranger to petitioner prior to August, 1951, and no dealer in narcotics could hope to remain at liberty very long if he accepted new and unknown customers with no hesitancy whatsoever.

The conclusion that the petitioner was not an innocent person who was victimized by Kalchinian becomes most reasonable when it is considered he supplied narcotics regularly and frequently, and that Kalchinian paid a price for the narcotics which was somewhat higher than that charged by his earlier sources of supply. This evidence indicates that petitioner was acting for profit, and not out of any desire to help a suffering addict.

Petitioner had considerable experience with narcotics. As long ago as 1942, he must have known that there was money to be made in the drug traffic and how to procure a supply, for his first conviction, in that year, evidences that he was in that business. Clearly he did not regard his first conviction as too high a price to pay, for in 1946 he was convicted of possessing narcotics. This is strong evidence that

he had not changed his ways during the intervening period, nor subsequent thereto.[3]

Petitioner argues that, because he met Kalchinian at the office of a doctor who attempted to cure narcotics addiction, it must be inferred that petitioner was attempting to cure his own addiction and rehabilitate himself. It could as reasonably be inferred that the accused went to the doctor's office as a source of customers, and not to rehabilitate himself. The frequency of sales and the high price are inconsistent with a sincere attempt at rehabilitation.

The basic issue on entrapment is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells* v. *United States*, 287 U.S. 435, 451. It is not enough to make out the defense to show that the particular offense was committed at the instance of a government agent, *Sorrells* v. *United States*, *supra*, for if the evidence reveals "an existing course of similar criminal conduct; the accused's already formed design to commit the

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[3] This case is distinguishable from *Masciale* v. *United States*, this Term, No. 796, in which this Court has granted a petition for a writ of certiorari. In that case there was only one sale; here, there were three extending over a period of several weeks. Here, it was shown that petitioner had two prior convictions for violating the narcotic laws; there, there was no evidence to that effect. Masciale testified that the government's informer, Kowel, asked Masciale to pose as a substantial narcotics dealer solely to impress Marshall, the government agent who posed as a buyer, and this testimony was not directly contradicted here, the petitioner did not testify.

crime or similar crimes; [or] his willingness to do so, as evinced by ready complaisance", the inducement is excused. *United States* v. *Becker*, 62 F. 2d 1007, 1008 (C.A. 2). Here the evidence permitted the inference that the accused was ready and willing to commit the offense charged; and the government's inducement merely provided the means for petitioner to realize his preexisting purpose. The issue was therefore properly submitted to the jury for decision. *Sorrells* v. *United States*, 287 U.S. 435, 452. Its conclusion, affirmed by the Court of Appeals,[1] presents no issue warranting further review by this Court.

2. Petitioner argues that it was error to introduce evidence of his prior convictions as part of the government's case in chief, since he did not take the stand. However, the entire opening statement of petitioner's counsel to the jury was devoted to expounding a theory of entrapment, and his counsel conducted a lengthy cross-examination of Kalchinian on that issue.

On this basis, petitioner's prior convictions became directly relevant to negative the defense of entrap-

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[1] It is true that the Court of Appeals for the Second Circuit, in its opinion on appeal after the first trial of this case, suggested (200 F. 2d 880, 883) that the trial court would have been justified in directing a verdict for the defendant, on grounds of entrapment, at the close of the government's case. The government, however, offered additional evidence at the second trial. It proved that the accused had profited from his sales to Kalchinian, and that he had a long record of criminal activity in the field of narcotics. Whatever might have been the view of the Court of Appeals following the first trial, it clearly indicated its belief that the defense was not made out at the second (R. 206).

ment and evidence of prior convictions was therefore proper. As this Court said in *Sorrells* v. *United States, supra*, 287 U.S. at 451-452, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

The previous convictions were not too remote to show criminal predisposition and design. Petitioner was sentenced to serve one year and six months for the offense in 1942 (R. 142). He was not sentenced for the 1946 crime until 1947, and on that occasion was placed on two years probation on condition that he enter the United States Public Health Hospital in Lexington, Kentucky, and stay there until cured of the drug habit. The judgment bears a certificate showing that accused did not enter the hospital until March 10, 1947 (Special Record, Exhibit 1). While incarcerated, the accused could not have engaged in the drug traffic as a regular business and these periods should be excluded in determining remoteness.

In any event, the mere lapse of time should go to the weight to be given to the previous convictions, not to their admissibility. It is true that the existence of a substantial time period between prior offenses and the present one permits the inference that accused may have reformed. But is also permits the inference that accused gained in cunning and adeptness at concealing his activities as a result of his previous convictions. This choice of inferences should

be left to the jury. Even though time has gone by, the previous convictions show that accused was no novice in the drug traffic.

In *United States* v. *Valdes*, 229 F. 2d 145 (C.A. 2), three years elapsed between the last prior narcotics conviction and the current offense, and yet no question of remotenes was raised. Similarly, in *Carlton* v. *United States*, 198 F. 2d 795 (C.A. 9), three years had elapsed and no problem of remoteness was raised, even though the prior conviction was for a misdemeanor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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